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No. 342

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IN THE

Supreme Court of the United States

October Term, 1945

STEVE ANDERSON, EARL TROMBLEY, LILLIAN SOCIA, ALBERT WATKINS, ARTHUR SIBBE, NELSON LUCHTMAN, RITA SCHUETE, individually, for and in behalf of themselves and others similarly situated; and LOCAL NO. 1083, UNITED POTTERY WORKERS OF AMERICA, affiliated with the Congress of Industrial Organizations, Mt. Clemens, Michigan.

Petitioners,

vs.

MT. CLEMENS POTTERY COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original opinion of the District Court (R 239-248) is reported in 60 F. Supp. 146. The District Court's find-

ings of fact and conclusions of law (R 272-274) and a supplemental opinion by the District Court (R. 287-292) do not appear to have been officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 149 F. (2d) 461.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered May 21, 1945. A copy of the petition for certiorari was served on respondent's counsel on August 20, 1945. We have not received a copy of any separate brief in support of the petition, and assume that none was filed. Petitioners aver that they invoke jurisdiction of this Court "under the provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 1063, 29 U.S.C. Sec. 207 (a)." (Petition, p. 2).

STATEMENT OF THE CASE

This action was filed in April, 1941, by Local 1083, United Pottery Workers of America, C.I.O. and seven members of said Union, a few days after an organizational strike had been instituted by the Union against the Mt. Clemens Pottery Company, which operates in Mt. Clemens, Michigan, the largest single unit pottery plant in the United States (R. 1108), employing approximately one thousand to twelve hundred persons in the manufacture of dinnerware — plates, cups, saucers, etc., (R 382).

Disregarding claims set forth in the complaint but later dropped, and disregarding other claims on which the decision of the District Court was adverse to the plaintiffs (petitioners herein) and which they did not appeal, the only substantial issue was whether or not the employees or any of them started work a few minutes before the regular starting time, on occasions where an employee entered the plant before the time for starting work, and where there was no absolute physical impediment to his starting work a few minutes before the regular starting time. It was claimed by plaintiffs that this sometimes occurred; and that as a result some employees during the course of a workweek may have worked a little longer than was indicated by the Company's records. It was conceded that the employees received at least straight-time pay for any such time worked; but the claim was that in some cases these extra minutes extended the employees' total hours into the overtime brackets; and that in such instances they should have been paid time and a half rather than straight-time pay for such extra minutes of work, if any.

The case was referred to a Special Master, before whom hearings were conducted, covering some twenty-three court days and resulting in a transcript of testimony in excess of 3000 pages.

The evidence taken before the Master disclosed that the Company's time clocks were opened fourteen minutes before the starting time of each shift, and that employees were permitted to enter the plant and ring the clocks at any time during the fourteen minute period. It was necessary to allow this time so as to permit the employees to reach their departments and be ready to go to work at starting time. The proofs further disclosed that this was in accordance with the customary practice in manu-

facturing plants. Expert witnesses called by both parties testified that it is customary in all plants for the time clocks to be opened fifteen to thirty minutes before starting time so as to permit the employees to reach their places of work and be ready to start work at starting time. (R. 1237-1244; R. 1349-1359; R. 1459-1460.)

The testimony of several witnesses called by the defendant (respondent herein) was that the employees were instructed not to start work before starting time, and that in fact they did not start work before starting time, but that on the contrary it was often somewhat after starting time when work started. (R. 811, 989, 993, 1011, 1018, 1399-1400, 1173, 1302.)

Most of the employees were engaged in group operations, and could not start work until all the members of the group were on hand (R 183).

Eight employees or former employees were called by the plaintiffs (petitioners herein). They did not generally testify as to when work started (R 175). They testified, rather, that they punched their time cards and went to their departments. Some of them said that after arriving at their departments they went to work, but others did not venture even this assertion (R 180). One said that it had never occurred to him before the suit was started that he worked longer than the hours with which he was credited by the employer (R 651). The plaintiffs in the main rested their case on the theory that they must be paid from the moment they punched the time clock on entering the plant—making this contention despite the testimony of their own expert witness, a research director of the C.I.O., that the punching of the time clock does not coincide with the starting of work and does not bear

any direct relationship to the time of starting work (R 1459-60).

The Master found as a fact, on the basis of all the testimony, and giving weight to the apparent credibility of opposed witnesses, that if employees arrived early enough so as to have waiting time they did so voluntarily and were free to spend such time on their own behalf (R 199). He further found that production did not commence until the established starting time (R 191). He further found that there was no proof from which there could be computed for any individual plaintiff with any degree of reliability, either (a) the amount of time taken by certain preliminary activities, such as putting on overalls and gloves, opening windows, turning on light switches, etc; or (b) the proportion of the time, if any, so spent in advance of the established starting time (R 201). He accordingly found that the plaintiffs' claims should be dismissed.

On exceptions taken by the plaintiffs (petitioners) to the Master's report, the District Court (R 244) affirmed the finding of fact by the Master (R 199) that the hours of work could not be computed from the moment an employee punched the time clock on entering the plant in the morning; and the plaintiffs (petitioners herein) did not appeal from this finding. The District Court further affirmed the finding of fact by the Master that, under the circumstances of this case, the time spent by employees in punching the time clock and walking to the department, and waiting for other employees to arrive, was not working time (R 199, 241-244). Plantiffs (petitioners herein) did not appeal from this finding.

Thus there is no question in this case as to what activities are to be included as a part of the employees' hours

of work. The factual findings of the Master on this point were confirmed by the District Court, and no appeal was taken. The question was, rather, at what time work started. The Master found that there was no proof of work having started before starting time. The District Court, without taking additional testimony, concluded that "while in the main agreeing" (R. 241) with the findings of the Master that the allegations of plaintiffs as to starting work ahead of starting time were not true, held that it could nevertheless be assumed—on the basis of the Court's personal experience rather than on any proof (R 243)—that plaintiffs who had entered the factory earlier than the Court believed was necessary to have permitted them to start work at starting time, might have started work before starting time. The District Court therefore concluded that some (not all) employees did start work early (R 272). As a basis of estimating the amount of time (thus conceding that there was no proof as to the amount—in fact, the District Court characterized the evidence of the employees as to when work started as testimony which was not worth a continental—R 1506), the District Court adopted a formula that there should be added to the hours of work of each employee the number of minutes by which the time that such employee punched the time clock preceded seven minutes to starting time at the beginning of the day or preceded five minutes to starting time at the beginning of work after lunch (R 244, 273). In other words, an employee who punched in at seven minutes before starting time in the morning would not be given credit for any extra work; but an employee who punched in at eight minutes before starting time in the morning would receive credit for one minute's extra work regardless of whether or not there was any testimony whatever that the employee started work before starting time; and an employee

who punched in at ten minutes before starting time in the morning would receive credit for three minutes extra work, etc. In the afternoon, an employee who punched in at seven minutes before starting time would receive credit for two minutes extra work; an employee who punched in at eight minutes before starting time would receive credit for three minutes extra work, etc. This formula did not purport to be based on any testimony of any witnesses but represented rather a rough guess and arbitrary adjustment.

Computations made in accordance with this formula disclosed that the total amount of extra compensation for overtime (figured as required by the District Court's opinion) was $1,207.87 for 289 individuals, or an average of not quite $4.18 for a long period of time, representing an average of approximately one cent a day. Pursuant to the statute, liquidated damages in equal amount were added, and a judgment was entered against the defendant (respondent herein) in the sum of $2,415.74 (R 305).

The defendant (respondent herein) appealed to the Circuit Court of Appeals for the Sixth Circuit. The plaintiffs (petitioners herein) did not take any cross appeal. The Appellate Court, finding that there was substantial evidence to support the factual findings of the Master, and that there was no showing of any clear error therein, concluded that it was error for the District Court to refuse to accept these findings, resting its decision on the plain requirement of Rule 53 (e) (2) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Sec. 723 (c), which provides in part that "in an action to be tried without a jury the Court shall accept the Master's findings of fact unless clearly erroneous." The Appellate Court further ruled that the arbitrary formula applied by the District

Court produced a judgment based upon surmise and conjecture, and was hence invalid.

Accordingly, and without specific discussion of other points relied upon by the defendant (respondent herein), the Circuit Court of Appeals entered its judgment that the cause of action be dismissed.

QUESTIONS INVOLVED

Thus, as the case comes to this Court, it presents very narrow issues.

1. The first is whether or not the Circuit Court of Appeals correctly determined that "there was abundant substantial evidence to support the findings of the special master and it could not appropriately be said that such findings are clearly erroneous." (149 F. (2d) 461, 465). Under the findings of fact by the Master, there can be no question but that plaintiffs' cause must be dismissed. As the District Court said, the Master found that the claims of plaintiffs (petitioners herein) as to starting work early were not true (R 241). Therefore, unless upon a review of all the evidence it should be concluded that the Master's findings are clearly erroneous and not supported by substantial evidence, there can be no further question presented.

2. If on a review of all the evidence it should be concluded that the Master's findings were clearly erroneous and therefore not binding upon the District Court, a second question would arise as to whether or not the formula

adopted by the District Court produced a judgment based upon surmise, speculation and conjecture, and hence invalid. The Circuit Court of Appeals so held.

3. If certiorari were granted, this Court would also be called upon to review other points raised by the Company in the Circuit Court of Appeals but not specifically discussed in that Court's opinion. These points are enumerated in the Statement of Points Relied Upon (R. 364), and were briefed and argued before the Circuit Court of Appeals.

ARGUMENT

1. Issues Suggested by Petitioners Are Not Presented by the Record.

The argument of the petitioners (p. 4) is that the Circuit Court of Appeals refused the employees compensation for working time spent on the employer's premises; but this argument assumes that there was proof of uncompensated working time. This assumption is not supported by the record. The decision below did not involve an issue as to what was work, or what activities should be included in computing working time. Rather, the issue was as to when work started. The Circuit Court of Appeals found that there was abundant substantial evidence to support the factual finding of the Master that work did not begin prior to starting time. Accordingly, it applied the plain mandate of Court Rule 53 (e) (2) and held that this finding of fact, which was not assailed as being clearly erroneous, was conclusive.

The suggestion of petitioners (p. 8) that employees should be paid from the moment they ring the time clock

on entering the plant in the morning until the moment they again punch the time clock on leaving the plant, involves a question that is not and cannot be raised on this record. The District Court specifically found against the petitioners on this point (R. 244), and since petitioners (plaintiffs in the original action) did not appeal from this ruling of the District Court, such ruling and judgment became *res judicata*. Not having appealed, the plaintiffs in the lower court could not attack the District Court's judgment in the Circuit Court of Appeals, with a view to enlarging their own rights thereunder.

Peoria & Pekin Union Railway Co. v. United States, et al., 263 U. S. 528 (1923);

Alexander, Collector v. Cosden Pipe Line Co., 290 U.S. 484 (1933);

Helvering, Commissioner v. Pfeiffer, 302 U.S. 247 (1937);

LeTulle v. Scofield, 308 U.S. 415 (1939); and other cases there cited.

This issue accordingly was not before the Circuit Court of Appeals. The issue not having been raised in the Circuit Court of Appeals, it cannot be raised here.

Pierce v. United States, 255 U.S. 398, 405.

Hiawassee River Power Co. v. Carolina-Tennessee Power Co., 252 U.S. 341 (1920);

Illinois Central Railroad Co. v. Mulberry Hill Coal Co., 238 U.S. 275 (1914).

We feel compelled to direct the Court's attention to the circumstance that throughout petitioners' application for certiorari there are found argumentative statements concerning various aspects of the case which are not sup-

ported by the record but are in fact contradicted by the record. Without attempting to review such instances fully, may we point out a few illustrative instances. It is alleged on page 3 of the petition that the "petitioning employees were required to report and proceed to work as much as 56 minutes a day for which they were not compensated." This is entirely without support in the record, or in any findings. Yet, the charge is repeated, on page 6 of the petition, where it is set forth that the District Court found that the defendant company (respondent) required its employees to report for work at fourteen minutes to seven o'clock in the morning, starting work practically immediately, and yet computed their hours from seven o'clock, continuing this practice throughout the day, so that the employees worked approximately fifty-six minutes every day, which was not computed in figuring overtime. Petitioners refer to page 240 of the record. Reference indicates that the Court was stating this as the claim of the plaintiffs; but the Court found that this claim was not proved. On the contrary, it was found that employees were not required to, and normally did not, punch in fourteen minutes before starting time. This is referred to in the report of the Master (R 177) and the opinion of the District Court (R 243). Likewise, it was pointed out in the Master's report (R 182), and was referred to in the opinion of the District Court (R. 244), that employees did not continue work after the regular quitting time, but frequently quit work early. The finding is precisely the contrary from petitioners' assertion.

Again, it is said on page 3 of the petition that the District Court personally examined witnesses. This was not the case.

On page 5, it is said that the time clock cards were the only records of working time maintained by the Com-

pany. This is incorrect. The record herein contains many exhibits comprising the Company's records of working time, other than time clock cards, which (in accordance with the usual practice, R. 1237, 1460) were used primarily as attendance records.

It is further averred (p. 5) that the Mt. Clemens Pottery Company "had the unusual and unfair method of computing working time of employees from the subsequent quarter hour after the employees checked in for work, and from the prior quarter hour when they checked out." The fact is, that plaintiffs' (petitioners') own witnesses did not dispute the testimony of defendant's witnesses that the general and customary practice in computing working time was the same as that followed by respondent (R 1459-60, R 711; cf. R 1237-1244; R 1340-1341; R 1349).

Again it is charged (p. 5), that the evidence revealed that it took between one minute and two minutes from the time when the employees checked through the time clock cards to the time when they undertook productive labors. There was no such finding, and we submit there was no such evidence. The suggestion on page 7, that the Circuit Court of Appeals decided that an employer could require his employees to report on the premises and undertake productive labors at any time and then pay said employees only for an arbitrary starting time, which began a considerable time after actual productive labors were undertaken, is obviously a complete perversion of the opinion of the Circuit Court of Appeals. We repeat that the record herein does not present the issues suggested by petitioners.

2. The Decision of the Circuit Court of Appeals Is Not in Conflict With Decisions of Other Circuit Courts Nor With Applicable Decisions of This Court.

The decision in the instant case is not in conflict with the holdings of this Court in *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, et al.*, (321 U.S. 590 (1943)), and *Anderson v. Mt. Clemens Pottery Co.*, (328 U.S. 680 (1946)). Nor is it in conflict with the decisions of the Circuit Courts of Appeals in *Jewell Ridge Coal Corporation v. Local No. 6167, United Mine Workers of America*, No. 121, decided May 7, 1945, 65 S. Ct. 1063. In both these cases, the issue was whether or not certain activities constituted working time within the meaning of the Fair Labor Standards Act. That issue was not presented here. In this case, the District Court concurred in the findings of the Master and, no appeal having been taken to the Circuit Court of Appeals, the issue is foreclosed, that on the particular facts here disclosed the time spent by employees in punching the time clocks and walking to the department and waiting there until work started was not working time (R. 199, 241-244). The only issue was the factual inquiry as to whether, after reaching their departments, the employees started work before starting time.

Both the District Court and the Circuit Court of Appeals referred to the decision in the *Tennessee Coal* case, *supra*. When the District Court filed its opinion, the *Tennessee Coal* case had progressed through the Fifth Circuit Court of Appeals. The District Court, observing that under the decision of the Circuit Court of Appeals

compensation was not allowed the miners for time spent changing their clothes and getting ready for work—all of which took at least ten minutes) said: "As a matter of fact, if this Court is to rely upon that decision plaintiffs are entitled to nothing here." (R 244). When the instant case reached the Sixth Circuit Court of Appeals, the Supreme Court had affirmed the Fifth Circuit Court's decision in the *Tennessee Coal* case, and the Sixth Circuit Court of Appeals in the instant case pointed out that its decision was in agreement with the determination in the *Tennessee Coal* case (149 F. (2d) 461, 465). In other words, the District Court said that if it had followed the decision in the *Tennessee Coal* case it would have dismissed plaintiffs' claims, and the Circuit Court of Appeals, following that decision, did dismiss plaintiffs' claims.

The *Jewell Ridge* case, so far as it has a bearing on the issues here involved, adds nothing to what was decided in the *Tennessee Coal* case. In both those cases, the decision of the Supreme Court was directed solely to the question as to whether or not time spent by miners in traveling through the shafts of the mine comprised "working time." This is quite different from time spent by workers in an industrial plant walking from the time clock to their departments. The distinction was pointed out in the Master's report (R 198).

The judgment of the Sixth Circuit Court of Appeals in the instant case is fully supported by the decisions of the Supreme Court in *Skidmore, et. al. v. Swift & Company*, 323 U.S. 134 (1944), and *Armour & Company v. Wantock, et. al.*, 323 U. S. 126 (1944), holding that what is working time is essentially a question of fact in each case. In this case, the Circuit Court of Appeals, quoting the decision

of the Supreme Court in the *Skidmore* case, observed that "'Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.' The crucial question of fact in the instant case had been resolved against the appellees, upon substantial evidence, by a special master to whom the district judge had referred the cause. The fact findings of the master were certainly not clearly erroneous." (149 F. (2d) 461, 466).

3. The Decision Is Not of Importance In the Administration of the Act.

The issues passed upon by the Circuit Court of Appeals herein related exclusively to the particular factual situation involved. The decision would have but limited applicability to other cases. The Court was not called upon to decide whether or not certain activities constitute working time within the meaning of the Act, nor was the Court called upon to decide any other important question of Federal law, which has not been, but should be, settled by the Supreme Court. Rather, the Circuit Court of Appeals was required to review the evidence and the inferences which had been drawn therefrom; and the office of a writ of certiorari herein would be simply to permit a further review by this Court of the evidentiary details of a lengthy record. Certiorari is not ordinarily granted for this purpose, and there is no suggestion of any reason for the Court to deviate from its ordinary course in this particular case.

United States v. Johnston, 268 U.S. 220 (1925);

Southern Power Company v. North Carolina Public Service Company, et al., 263 U.S. 508 (1923).

Indicative of the fact that no great public interest is here involved, is the circumstance that the Wage and Hour Division of the United States Department of Labor (which as this Court may judicially notice has frequently appeared *amicus curiae* in important cases involving the administration or interpretation of the Fair Labor Standards Act) did not see fit to appear in this case.

4. The Circuit Court of Appeals Did Not Depart from the Usual Course of Judicial Proceedings.

The decision of the Circuit Court of Appeals involved essentially the application of the mandate established by Court rule (Rules of Civil Procedure, Sec. 53 (e) (2), 28 U.S.C.A. following Sec. 723 (c), that in an action tried without a jury, the Court must accept the Master's findings of fact unless clearly erroneous. It is well established that where the Master's findings are supported by substantial evidence, they cannot be said to be clearly erroneous. Upon reviewing the entire record, and finding that the Master's findings were supported by "abundant substantial evidence" (149 F. (2d) 461, 465) the Circuit Court of Appeals applied the rule which has been uniformly applied in a long series of cases.

Santa Cruz Oil Corporation v. Allbright-Nell Company, (C.C.A. 7th, 1940), 115 F. (2d) 604, 607;

Morris Plan Industrial Bank v. Henderson, (C.C.A. 2d, 1942), 131 F. (2d) 975, 976;

In Re Connecticut Company, (C.C.A. 2d, 1939), 107 F. (2d) 734;

Arrow Distilleries, Inc., v. Arrow Distilleries, Inc., (C.C.A. 7th, 1941), 117 F. (2d) 636;

In Re Chicago & N. W. Ry. Co., (C.C.A. 7th, 1943) 138 F. (2d) 753;

National Labor Relations Board v. Remington-Rand, Inc., (C.C.A. 2d, 1942), 130 F. (2d) 919.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

Rule 53 (e) (2), Federal Rules of Civil Procedure, 28 U.S.C.A. following Sec. 723 (c), provides:

> "(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."